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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

PETITION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR, FOR REHEARING.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Counsel for Chicago and North Western Railway Company, Debtor, Petitioner.

May 7, 1943.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

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PETITION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR, FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Chicago and North Western Railway Company, Debtor, petitioner, herein called petitioner, respectfully applies to this Court, pursuant to Rule 33 of the Revised Rules of this Court, for a rehearing of the

decision of this Court, denying its petition for writs of certiorari, and shows in support thereof, as follows:

I.

This Court denied the petition for writs of certiorari on April 19, 1943. On April 27, 1943, petitioner presented to the District Court of the United States for the Northern District of Illinois a motion for leave to file a petition for an order, either directing the Trustee of Debtor's estate to pay the claim of the Reconstruction Finance Corporation, which, as of December 31, 1942, principal and interest at 4 per cent, amounted to $48,322,687.15, with directions to the clerk of the District Court to transmit the proceedings to the Interstate Commerce Commission to consider modification of the plan of reorganization made necessary by such payment, or, in the alternative, for an order directing the clerk of the District Court to transmit the proceedings to the Interstate Commerce Commission for consideration of a modified plan of reorganization which shall provide for the payment of the claim of the Reconstruction Finance Corporation in cash, and distribution of the securities allocated to Reconstruction Finance Corporation under the plan among creditors and/or stockholders of the Debtor, a copy of which petition is attached hereto as "Appendix A."

II.

The District Court denied the said motion, a copy of the order denying the motion being attached hereto as "Appendix B." Filed herewith is a certified copy of said order and of the transcript and certificate of evidence of all the proceedings had in the District Court

on the motion for leave to file said petition, and said transcript is attached hereto as "Appendix C."

III.

The action of the District Court refusing leave to file said petition was based upon the fact that in motions filed herein by petitioner to supplement the record in this Court, there had been included statements of the cash position of Debtor's estate and that request was made that, if the petition for writs of certiorari be denied, the mandate of this Court should

> "definitely provide that such action is taken without prejudice to the exercise of equitable jurisdiction of the District Court in accordance with Section 77. Such a proviso is necessary to dispel any doubt that the District Court might otherwise have that it is not within its jurisdiction to entertain such petition."

During the hearing in the District Court on the motion for leave to file the petition for an order directing the Trustee to pay the claim of the Reconstruction Finance Corporation in full and/or for an order remanding the proceedings to the Commission for consequent modification of plan, as appears in the transcript of such hearing, counsel objecting to the filing of the petition, stated (see page 25 hereof):

> "Now, Mr. Walter has said to your Honor that surely there is jurisdiction in this Court to do what he requests. I think Mr. Walter has admitted within a month, in the Supreme Court of the United States, that this Court does not have any such jurisdiction.
>
> "It may surprise this Court to know that Mr. Walter has filed five briefs in the Supreme Court, in the course of a year—the last on April 1st, the

last four of those briefs within three and one-half months. And in the last brief that he filed, he argued—as he did in every one of those briefs, this matter of paying the R. F. C.; and in the very last brief he specifically asked the Supreme Court, if it denied certiorari, to reserve in its denial, in its mandate, jurisdiction in this Court, so that it could act upon this motion which he then contemplated filing.

"Now, there has been filed in this Court today, the Supreme Court's unqualified denial of certiorari, made in the face of that specific request; and so I say it stands conceded that this Court does not have jurisdiction—and we ask that an order be entered on those two grounds."

That the District Court was controlled in its conclusion not to permit the filing of the petition above referred to, by the fact that this Court had failed to attach to its decision denying petition for writs of certiorari any provision, such as was requested by counsel for the Debtor, is shown by the following excerpt from the transcript of proceedings (pages 31-32):

"THE COURT: Well, now, in this petition—Have you concluded?

"MR. WALTER: I think that is all.

"It may be, if the Court has any doubt about whether this should be filed, that we ought to file a memorandum of authorities. It is an important matter.

"THE COURT: No. I don't think it is necessary, unless your answers to my questions change my view.

"MR. WALTER: I didn't get the Court's statement.

"THE COURT: I don't think it is necessary to file a memorandum of authorities, unless your answers to the questions which I am about to propound may change my views.

"MR. WALTER: All right.

"THE COURT: In this petition that you are presenting this morning, you make the statement

that there has been a change in the financial position of the debtor.

"MR. WALTER: Yes.

"THE COURT: For the better.

"MR. WALTER: We say now there is eighty millions on hand, aside from working capital and so forth.

"THE COURT: You presented those same facts to the Supreme Court?

"MR. WALTER: No.

"THE COURT: How?

"MR. WALTER: There is a difference now, in that there is more cash on hand now than there was then.

"THE COURT: The list presented to the Supreme Court showed how much?

"MR. WALTER: I think it was some seventy millions.

"THE COURT: Well, there couldn't be much change since the first of April.

"MR. WALTER: Well, several millions of dollars a month increase in the cash position."

(Pages 33-34):

"THE COURT: I am familiar with those cases which say that until discharge, orders, judgments and decrees in bankruptcy do not have that finality which pertain to other orders and decrees after term-time. I am familiar with those cases. But there have been two orders in this case, one approving the plan and one confirming the plan, both of which have all the finality that an order in bankruptcy can have. And those orders have been approved and affirmed by the Circuit Court of Appeals of this Circuit, and the Supreme Court has declined to interfere.

"Now, it is always desirable that the Court be right. That is the first principle that should govern. But it also is desirable that a court's actions should be seemly. And if the action can be right and seemly at the same time it is desirable.

"Now, it seems to me that it would be unseemly for me to make any change in this plan after the Circuit Court of Appeals of this Circuit has said

that it is a good plan and should be put into effect, and after the Supreme Court of the United States has declined to interfere with that judgment.

"It would seem to me to be unseemly to do that, and I certainly should not do that unless I thought there was some overpowering reason to compel me to do that; and I don't think that that overpowering reason exists here."

IV.

The order attached hereto as "Appendix B," provides:

"* * * and the Court having heard arguments of counsel in support of and in opposition to said motion, and having considered the mandates of the Circuit Court of Appeals filed this day affirming the orders of the Court approving and confirming the plan of reorganization herein, pursuant to the denial herein of all petitions for certiorari by the Supreme Court on April 19, 1943, and being fully advised in the premises,

"It Is Ordered that the motion of Chicago and North Western Railway Company, Debtor, for leave to file said petition be, and it hereby is, denied."

V.

Under the decision of this Court in Docket Nos. 11-19, 32, *Group of Institutional Investors et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company et al.*, and Docket Nos. 7, 8, 20, 33, and 61, *Ecker et al.* v. *Western Pacific Railroad Corporation et al.*, it is settled law that the Interstate Commerce Commission alone can prescribe the plan of reorganization. The original plan of reorganization in the instant case was certified by the Commission to the District Court under date of December 19, 1939 (Tr. 3503); that plan with some mod-

ification was again certified to the District Court on April 8, 1940 (Tr. 3661); as of September 30, 1939 (the nearest date for which balance sheet was available to the Commission prior to the decision of the Commission), the cash on hand in the Debtor's estate was $12,253,685 (Tr. 1369); as of the close of business on April 19, 1943, there was in the Debtor's estate more than $80,312,688 in cash and cash items (page 12 hereof) available for payment of claims such as that of the Reconstruction Finance Corporation.

VI.

Under the decisions of this Court, in cases such as the pending one, it is necessary that the final plan of reorganization shall reflect present-day conditions. Therefore, the Interstate Commerce Commission should have an opportunity to determine, in view of the tremendous amount of cash now available for payment of claims, whether the plan should be modified so as to require the payment of the claim of the Reconstruction Finance Corporation in cash, in whole or in part, and change of the structure in such plan of reorganization to reflect such payment.

VII.

If it be true that this Court by its decision herein, denying petition for writs of certiorari, expressed no opinion as to the right of the District Court to consider a petition for modification and intended to express no opinion of this Court or restriction upon the jurisdiction of the District Court to consider the changed cash position of the Debtor's estate, it seems necessary and desirable that this Court grant a rehearing herein and

make clear in its decision that the District Court should receive and consider a petition such as was presented to the District Court on April 27, 1943.

Wherefore, petitioner, Chicago and North Western Railway Company, Debtor, respectfully prays that, pursuant to Rule 33 of the Revised Rules of this Court, a rehearing of the decision of this Court of April 19, 1943, be granted, and that the proceedings be remanded with directions to the District Court either (a) to consider the petition of April 27, 1943, above referred to, or (b) to remand the proceedings to the Interstate Commerce Commission to consider revision of the plan of reorganization to give effect to payment of the claim of the Reconstruction Finance Corporation in whole or in part.

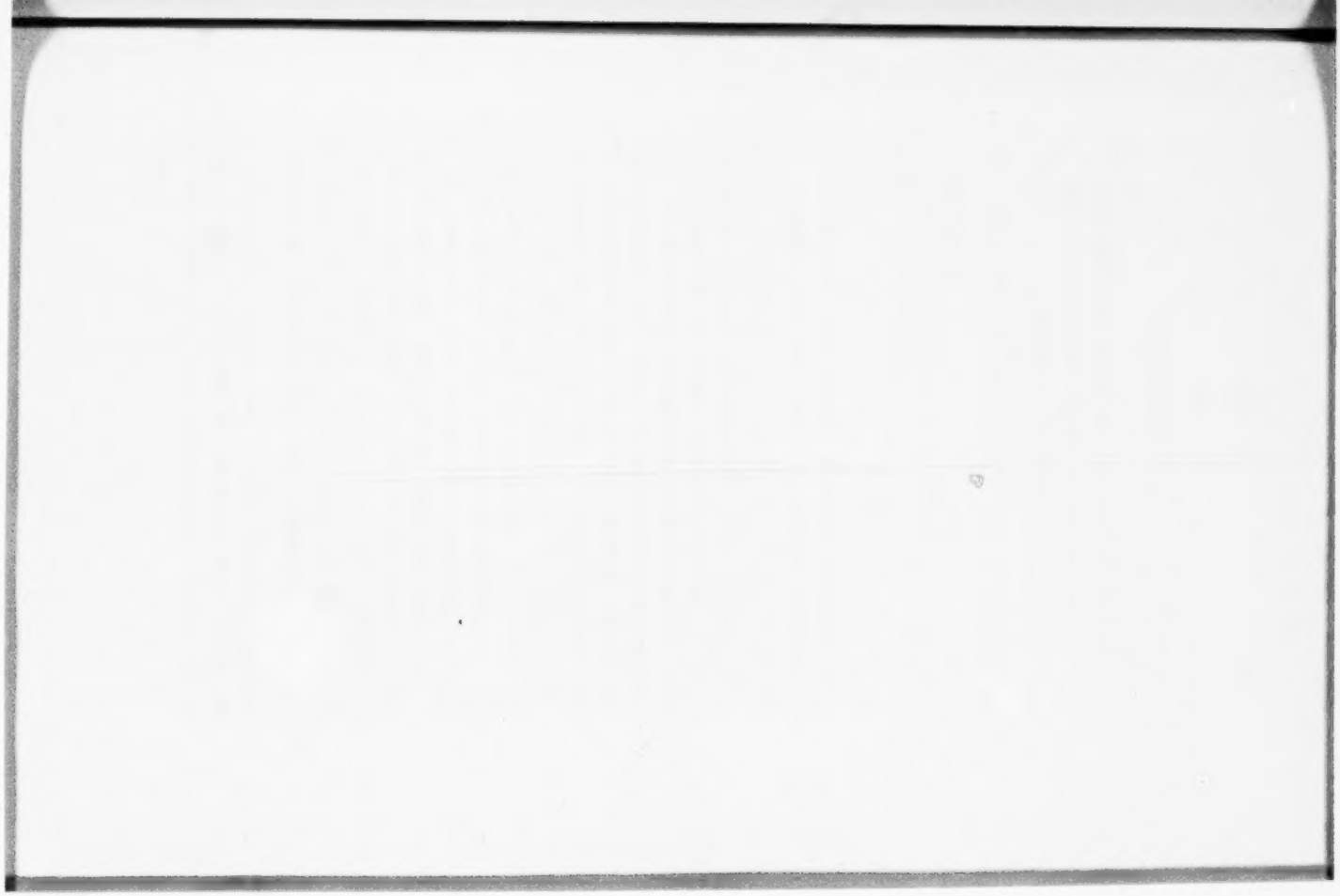
Respectfully submitted,

HELEN W. MUNSERT,
LUTHER M. WALTER,
Counsel for Chicago and North Western Railway Company, Debtor, Petitioner.

AFFIDAVIT.

I, Luther M. Walter, counsel for petitioner, Chicago and North Western Railway Company, Debtor, certify that the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

LUTHER M. WALTER.



APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad.

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Debtor. } No. 60448

Petition of Chicago and North Western Railway Company, Debtor, for an order directing Charles M. Thomson, Trustee, to pay in cash the claim of the Reconstruction Finance Corporation with interest at 4 per cent, and for an order transmitting the proceedings to the Interstate Commerce Commission for such modification of the plan of reorganization of the debtor consequent upon payment of said claim; or, in the alternative, for an order transmitting the proceedings to the Interstate Commerce Commission directing said Commission to consider, and report to the Court, whether, under present circumstances, the plan of reorganization heretofore certified to this Court by the said Commission shall be modified to provide for the payment in cash of the claim of the Reconstruction Finance Corporation with interest at 4 per cent, and further modification of the plan of reorganization required by such payment.

Now comes the Chicago and North Western Railway Company, Debtor, by Helen W. Munsert and Luther M. Walter, its attorneys, and respectfully represents to the Court:

1. The plan of reorganization of the Debtor certified by the Interstate Commerce Commission and approved by this Court provides for the issuance to the Reconstruction Finance Corporation of the following items of securities as of January 1, 1939, in settlement of its claim for principal amount of notes, of $42,250,133 and accrued interest of $6,934,772, in accordance with the rates of 5 per cent and 6 per cent as stated in the notes:

Securities of reorganization company allocated with full ownership in R.F.C. (Tr. 3677):		
Fifteen-year secured notes	$25,000,000	
First and general mortgage bonds, Series A	7,783,180	
Second mortgage convertible income bonds, Series A, 4½ per cent	12,114,530	
Preferred stock, Series A, 5 per cent	15,543,462	
Common stock, no par (stated at $100 a share)	23,259,836	
Total		$83,701,008
Securities given unconditionally to R.F.C. (Tr. 3701):		
Union Pacific Railway Company preferred stock, par value	$ 2,085,000	
New York Central Railroad Company 4 per cent bonds, 1998	64,000	
New York Central & Hudson River Railroad Company 4½ per cent bonds, 2013	100,000	
Total		2,249,000

Securities given as collateral to secure $25,000,000 of 15-year notes (Tr. 3701):		
Chicago and North Western Railway Company equipment trust 4½ per cent, Series Y certificates	$ 104,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company first mortgage, Series A, 5 per cent, due 2000	45,186,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company equipment trust 4¾ per cent Series I certificates	128,000	
Indiana Harbor Belt Railroad Company capital stock	1,520,000	
Sioux City Bridge Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	945,800	
Superior Coal Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	2,000,000	
Total		49,883,800
Grand Total		$135,833,808

2. As of September 30, 1939, (the nearest date to the date of the Commission's decision certifying plan of reorganization) as appears from the balance sheet of the Debtor's estate (Tr. 1369), there was in the Debtor's estate under the control of Charles M. Thomson, Trustee, cash as follows:

(708) Cash	$11,845,755.76	
(709) Temporary cash investments	—	
(711) Special deposits	408,110.00	
Total		$12,253,865.76

3. As of July 31, 1940, (the nearest date to date of opinion of District Court) as appears from the balance sheet of the Debtor's estate (Tr. 4077), there was in the Debtor's estate under the control of Charles M. Thomson, Trustee, cash as follows:

(708) Cash	$16,559,621.04
(709) Temporary cash investments	—
(711) Special deposits	439,383.94
Total	$16,999,004.98

4. As of the close of business on April 19, 1943, there was in the Debtor's estate under the control of Charles M. Thomson, Trustee, cash as follows:

(708) Cash	$44,893,086.45
(709) Temporary cash investments	28,451,181.25
(711) Special deposits	6,968,420.64
Total	$80,312,688.34

On the foregoing items of cash, Debtor's estate is receiving no interest other than on temporary cash investments, on which interest is at the rate of $\frac{1}{8}$ of one per cent per annum.

5. The indebtedness to the Reconstruction Finance Corporation as of December 31, 1942, principal and interest at 4 per cent, amounted to $48,322,687.15. This Court by its order of March 29, 1943, authorized the Trustee to pay such interest on the new securities for the period ending December 31, 1942, approximating $1,617,356.00.

6. Petitioner further shows that the said plan of reorganization of the Debtor made provision for Class 16, holders of 20-Year $4\frac{3}{4}$ Per Cent Convertible Bonds of 1949, Series A, in the amount of $45,860,390, leaving a balance of principal and interest as of January 1,

1939, unprovided for under the plan of $40,790,910. No provision in the plan of reorganization was made for participation by either the holders of preferred stock of the Debtor company in the aggregate par value of $22,395,000, or by the holders of common stock of the Debtor company in the aggregate par value of $158,-440,300.

7. Petitioner alleges that payment of the claim of the Reconstruction Finance Corporation as above set forth was not provided for in the plan of reorganization as certified by the Interstate Commerce Commission, and as approved by this Court, for the reason that at the time of such certification by the Commission and at the time of such approval by the Court cash was "not available."

Petitioner is informed and upon such information and belief alleges that adequate cash for the payment of said claim of the Reconstruction Finance Corporation is now available and that such payment is in the interest of creditors of the Debtor's estate, in the interest of Debtor's estate, and is in the public interest.

WHEREFORE, petitioner prays that an order be entered herein authorizing and directing Charles M. Thomson, Trustee, to pay in cash the claim of the Reconstruction Finance Corporation as above set forth and directing the clerk of this Court to transmit the proceedings to the Interstate Commerce Commission for its consideration of modification of the plan of reorganization so as to permit such payment in cash and distribution of securities allotted to the Reconstruction Finance Corporation under the plan heretofore certified, to creditors and/or stockholders of the Debtor; or, in the alternative, for an order directing the clerk of this Court to transmit the proceedings to the Interstate Commerce

Commission for consideration of a modified plan of reorganization which shall provide for the payment of the claim of the Reconstruction Finance Corporation in cash and distribution of the securities, allocated under the certified and approved plan of reorganization to the Reconstruction Finance Corporation, among creditors of the Debtor and/or stockholders of the Debtor.

Respectfully submitted,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR.
By HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Petitioner.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Luther M. Walter, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same are true as to his knowledge and belief.

LUTHER M. WALTER.

Subscribed and sworn to before me this 21st day of April, 1943.

ARLETA THOMPSON,
Notary Public.

APPENDIX B.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In a Proceeding for the Reorganization of a Railroad.

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Debtor.
No. 60448.

ORDER.

This matter coming on for hearing upon the motion of Chicago and North Western Railway Company, Debtor, for leave to file a petition praying that an order be entered herein authorizing and directing Charles M. Thomson, Trustee, to pay in cash the claim of the Reconstruction Finance Corporation and directing the clerk of this Court to transmit the proceedings to the Interstate Commerce Commission for its consideration of modification of the plan of reorganization so as to permit such payment in cash and distribution of securities allotted to the Reconstruction Finance Corporation under the plan heretofore certified, to creditors and/or stockholders of the Debtor; or, in the alternative, for an order directing the clerk of this Court to transmit the proceedings to the Interstate Commerce Commission for consideration of a modified plan of reorganization which shall provide for the payment of the claim of the Reconstruction Finance Corporation in cash and distribution of the securities, allocated under the certified and approved plan of reorganization to the Reconstruction Finance Corporation, among creditors of the Debtor and/or stockholders of the Debtor, and the Court hav-